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11 UNITED STATES DISTRICT COURT  
12 NORTHERN DISTRICT OF CALIFORNIA

13 **RACHEL BULETTE**, individually and on ) Case Number: 3:19-cv-00612-MMC  
14 behalf of all others similarly situated, )  
15 *Plaintiff,* ) **PLAINTIFF'S NOTICE OF MOTION,**  
16 *v.* ) **UNOPPOSED MOTION FOR**  
17 **WESTERN DENTAL SERVICES INC., et.** ) **PRELIMINARY APPROVAL OF CLASS**  
18 **al,** ) **ACTION SETTLEMENT AND**  
19 *Defendants.* ) **INCORPORATED MEMORANDUM OF**  
20 ) **LAW**  
21 ) Hearing Date: March 6, 2020  
22 ) Hearing Time: 9:00 a.m.  
23 ) Courtroom: 7  
24 ) Judge: Maxine M. Chesney  
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1           **TO THE HONORABLE COURT, ALL PARTIES, AND THEIR ATTORNEYS OF**  
2 **RECORD:**

3           **PLEASE TAKE NOTICE** that on March 6, 2020 at 9:00 a.m. or as soon thereafter as this  
4 matter may be heard in Courtroom 7 of the United States District Court for the Northern District of  
5 California, San Francisco Division, located at 450 Golden Gate Avenue, San Francisco, California,  
6 94102, before the Honorable Maxine M. Chesney, Plaintiff Rachel Bulette, on behalf of herself and  
7 a class of similarly situated persons, with the consent of Defendants Western Dental Services, Inc.  
8 and RevSpring, Inc., will and hereby does move the Court, by and through its counsel, for entry of  
9 an order preliminarily approving the class action settlement set forth in the Parties' Settlement  
10 Agreement ("Settlement" or "Agreement"), certifying a class for settlement purposes, and  
11 providing for issuance of Notice to the Settlement Class.<sup>1</sup> This motion is based on this Notice of  
12 Motion, the following Memorandum of Points and Authorities, the Declaration of Avi R. Kaufman  
13 (including exhibits attached thereto), all pleadings, records and papers on file, and such other  
14 matters that may be presented to the Court.

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17           **I. INTRODUCTION**

18           The Settlement Agreement establishes a non-reversionary Settlement Fund in the amount  
19 of \$9,700,000 for the benefit of the Settlement Class, which will also be used to pay the settlement  
20 costs. In addition to this excellent monetary result, as a direct result of this litigation, Defendants  
21 have ceased the practice of texting cellular numbers after receiving "Stop" requests in response to  
22 messages sent by or on behalf of Western Dental. If approved, the Settlement will bring an end to  
23 what has otherwise been, and likely would continue to be, hard-fought litigation centered on  
24 unsettled legal questions.

25  
26  
27 <sup>1</sup> The Agreement is attached as Exhibit 1. All capitalized terms used herein have the same  
28 definitions as those defined in the Agreement. Plaintiff anticipates filing the parties' signature pages  
by Monday, February 3, 2020.

1 This motion seeks the entry of an order providing for, among other things:

- 2 1. Preliminary Approval of the Settlement;
- 3 2. Preliminary certification of a Settlement Class and appointment of Plaintiff as Class  
4 Representative and Plaintiff's counsel Avi R. Kaufman and Rachel E. Kaufman,  
5 Kaufman P.A., and Stefan Coleman, Law Office of Stefan Coleman, P.A., as Class  
6 Counsel;
- 7 3. Approval of the Settlement Administrator;
- 8 4. Approval of the Notice program describing:
  - 9 a. The Settlement and the Settlement Class Members' rights with respect to the  
10 Settlement;
  - 11 b. The proposed Release of claims;
  - 12 c. Class Counsel's request for attorneys' fees and expenses and a service award for  
13 the Class Representative; and
  - 14 d. The procedures for opting-out of and for objecting to the Settlement.
- 15 5. Approval of the Claims process; and
- 16 6. The scheduling of a Final Approval Hearing to consider Final Approval of the  
17 Settlement.

18 The Parties' proposed Settlement is exceedingly fair and well within the range of  
19 Preliminary Approval for several reasons. *See* Declaration of Avi R. Kaufman (attached as Exhibit  
20 2) ¶ 2. First, it provides immediate relief for Settlement Class Members where their recovery, if  
21 any, would otherwise be uncertain, especially given Defendants' willingness to continue their  
22 vigorous defense of the case. Second, the Settlement was reached only after first engaging in  
23 extensive discovery and extensive arm's-length negotiations, including a full-day mediation before  
24 mediator Bruce A. Friedman with JAMS in Los Angeles. Third, the Settlement was not conditioned

1 on any amount of attorneys' fees for Class Counsel or Service Award for Plaintiff, which speaks to  
2 the fundamental fairness of the process. Kaufman Decl. ¶¶ 3-5.

3 For all these reasons, and as further described below, Plaintiff respectfully requests that the  
4 Court preliminarily approve the Settlement.

5  
6 **II. BACKGROUND**

7 **a. Facts**

8 The Telephone Consumer Protection Act, 47 U.S.C. § 227 ("TCPA"), and its implementing  
9 regulations were enacted by Congress and the Federal Communications Commission to "offer  
10 consumers greater protection from intrusive telemarketing calls...."<sup>2</sup> The TCPA's sponsor  
11 described unwanted autodialed and prerecorded calls as "the scourge of modern civilization. They  
12 wake us up in the morning; they interrupt our dinner at night; they force the sick and elderly out of  
13 bed; they hound us until we want to rip the telephone right out of the wall." 137 Cong. Rec. 30,821  
14 (1991) (statement of Sen. Hollings). As a remedial statute that was passed to protect consumers  
15 from unwanted automated telephone calls, the TCPA is construed broadly to benefit consumers.  
16 *Gager v. Dell Fin. Servs., LLC*, 727 F.3d 265, 271 (3d Cir. 2013). Plaintiff initiated this litigation  
17 against the Defendants alleging violations of the TCPA, and seeking, *inter alia*, monetary damages.

18  
19 **b. Procedural History**

20 On February 4, 2019, Plaintiff filed the Complaint against Western Dental Services, Inc. in  
21 this action. [D.E. 1]. On April 10, 2019, Plaintiff filed an Amended Complaint adding an additional  
22 claim against Western Dental. On June 28, 2019, Plaintiff sought leave to file a Second Amended  
23 Complaint adding RevSpring as a defendant.  
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28 <sup>2</sup> Federal Communications Commission, Small Entity Compliance Guide for the TCPA (dated May 13, 2013), [https://apps.fcc.gov/edocs\\_public/attachmatch/DA-13-1086A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DA-13-1086A1.pdf).

1 On August 30, 2019, RevSpring filed a Motion to Dismiss Non-California Class Members,  
2 a Motion to Strike Class Allegations, a Motion to Dismiss, based in part on the Constitutionality of  
3 the TCPA, and a Motion to Stay the Proceedings [D.E. 48, 49,50, and 51]. On September 23, 2019,  
4 Plaintiff responded in opposition to the four Motions [D.E. 55, 56, 57, and 58]. On September 30,  
5 2019, RevSpring filed Replies as to all of the Motions [D.E. 59, 60, 62, 63]. Both before and after  
6 this time, the parties engaged in written first party and third party discovery, the exchange of  
7 documents and other information, and Defendants' corporate representative depositions.

9 After the Motions were fully briefed and after the commencement of discovery, the Parties  
10 began settlement negotiations and agreed to engage in mediation. Based on the Parties' analyses  
11 of the relative strengths and weaknesses of their cases through formal and informal discovery, on  
12 December 4, 2019, the Parties engaged in a full-day, contentious mediation at JAMS in Los Angeles  
13 with mediator Bruce A. Friedman, resulting in an agreement in principle to settle the Action.  
14 Thereafter, the Parties provided notice of the Parties' agreement to settle the Action. Following  
15 nearly two months of further negotiations and further discovery, the Parties resolved all remaining  
16 issues, culminating in the Settlement Agreement.

18 The Parties recognize and acknowledge the expense and length of continued proceedings  
19 that would be necessary to prosecute the Litigation against Defendants through trial and potentially  
20 appeals. Plaintiff's counsel has taken into account the strength of Defendant RevSpring's pending  
21 Motions, Defendants' defenses, difficulties in obtaining class certification and proving liability, the  
22 uncertain outcome and risk of the litigation, especially in complex actions such as this one, and the  
23 inherent delays in such litigation. Plaintiff's counsel believes that the proposed Settlement confers  
24 substantial and immediate benefits upon the Settlement Class whereas continued and protracted  
25 litigation, even if successful, may have ultimately delivered none. Based on their evaluation of all  
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of these factors, Plaintiff and Plaintiff's counsel have determined that the Settlement is in the best interests of Plaintiff and the Settlement Class.

### **III. SUMMARY OF THE SETTLEMENT TERMS**

The following provides a summary and discussion of the material terms of the Settlement.

#### **a. The Settlement Class**

The proposed Settlement establishes a Settlement Class of:

All regular users or subscribers to numbers assigned to wireless carriers to which a text message was attempted using RevSpring's TalkSoft platform, after RevSpring received a text message containing the word "stop" from such number in response to a Western Dental text message, within four years of February 4, 2019.

Excluded from the Settlement Class are: (1) the Judge presiding over this action (or the Judge or Magistrate presiding over the action through which this matter is presented for settlement), and members of their families; (2) the Defendants, Defendants' respective subsidiaries, parent companies, successors, predecessors, and any entity in which the Defendants or their parents have a controlling interest and its current or former officers and directors; (3) persons who properly execute and file a timely request for exclusion from the class; and (4) the legal representatives, successors or assigns of any such excluded person(s). Agreement at ¶ 1.1.36. The Settlement Class encompasses the putative class members of all four of the putative classes defined in the Second Amended Complaint.

#### **b. Settlement Consideration**

Pursuant to the Settlement Agreement, upon Preliminary Approval, Defendants will establish a Settlement Fund in the amount of Nine Million Seven Hundred Thousand Dollars (\$9,700,000) for the purpose of making all required payments under the Settlement, including payments for Approved Claims, any approved Fee Award, any approved service award for Representative Plaintiff, and the costs of reasonable class notice and class administration. The Parties agree Defendants' maximum monetary obligation under this Agreement shall not exceed

1 \$9,700,000. Agreement at Section 4.

2 Moreover, as a direct result of this litigation, Defendants have stopped the complained of  
3 practice of sending text messages to persons after an opt out request is sent. The harm that the  
4 TCPA seeks to redress is consumer privacy violations through unsolicited telemarketing, including  
5 text messages, and this litigation and the Settlement accomplish this goal.  
6

7 **c. Settlement Administrator**

8 Pending this Court's approval, Epiq Systems will serve as the Settlement Administrator.  
9 The Settlement Administrator's responsibilities include: i. obtaining contact information for  
10 Settlement Class members from Defendants; ii. providing Mailed Notice; iii. establishing and  
11 maintaining the Settlement Website; iv. providing Long Form Notice through the Settlement  
12 Website; v. receiving, evaluating, and processing Claim Forms; vi. advising Settlement Class  
13 members if their Claim Forms are deficient; vii. providing reports about the Notice Plan and number  
14 and identity of opt-outs (if any) to Class Counsel counsel; viii. responding to any Settlement Class  
15 member inquiries; ix. processing all opt-out requests from the Settlement Class; x. at Class  
16 Counsel's request in advance of the Final Approval Hearing, preparing an affidavit to submit to the  
17 Court that identifies each Settlement Class member who timely and properly requested exclusion  
18 from the Settlement Class; xi. performing the duties described in the Agreement, and any other  
19 Settlement-administration-related function at the joint instruction of Class Counsel and Defendants;  
20 and xii. distributing claim payments to the Settlement Class Members that file Approved Claims,  
21 as detailed in the Agreement. Agreement at Sections 7 and 8.  
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23  
24 The anticipated administration costs are \$351,898, see Exhibit A attached to the Declaration  
25 of Avi R. Kaufman, which will be paid from the Settlement Fund. Those costs are reasonable  
26 compared to the size of the Settlement Fund and in light of the costs for First Class Mail notice to  
27 thousands of Class Members, plus First Class Mailing of the settlement checks.  
28

1                   **d. The Notice Plan**

2                   The Settlement Administrator will be responsible for administering the Notice Plan. The  
3 Notice Plan consists of two different components: (1) direct Mailed Notice and (2) Long-Form  
4 Notice to be provided on the Settlement Website. Agreement at Section 7. The forms of the  
5 proposed Long-Form Notice and Mailed Notice agreed upon by Plaintiff's Counsel and  
6 Defendants, subject to this Court's approval and/or modification, are attached to the Settlement  
7 Agreement as Exhibits B and C.  
8

9                   The Notice program is designed to provide the Settlement Class with important information  
10 regarding the Settlement and their rights thereunder, including a description of the material terms  
11 of the Settlement; a date by which Settlement Class members may exclude themselves from or  
12 "opt-out" of the Settlement; a date by which Settlement Class members may object to the  
13 Settlement; the process for submission of and a date by which a valid and timely Claim Form must  
14 be submitted; Class Counsel's fee application and/or the request for a Service Award; the date of  
15 the Final Approval Hearing; information regarding the Settlement Website where Settlement Class  
16 members may access the Agreement, and other important documents. The Notice Plan here is  
17 straightforward, easy to understand for Settlement Class members, and designed to inform members  
18 of their rights under the Agreement. Kaufman Decl. ¶ 10.  
19

20                   In connection with the direct Mailed Notice Plan, the Settlement Administrator shall  
21 perform reverse telephone number look ups to determine available associated mailing addresses  
22 that might exist for any Settlement Class members for whom Western Dental does not have such  
23 addresses, shall run addresses through the National Change of Address Database, and shall make  
24 reasonable attempts to resend notice to those whose notices are returned as undelivered. The  
25 Settlement Administrator shall send direct notice within thirty (30) days after the Court enters the  
26 Preliminary Approval Order.  
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1                   **e. Opt-Out and Objection Procedures**

2                   Any Settlement Class Member who does not wish to participate in this Settlement must  
3 write to the Settlement Administrator stating an intention to be “excluded” from this Settlement.  
4 This written request for exclusion must be sent via first class United States mail to the Settlement  
5 Administrator at the address set forth in the Notice and postmarked no later than the Opt-Out  
6 Deadline. A request for exclusion must be signed by the Settlement Class Member, and must  
7 include the Settlement Class Member’s name, address, and the telephone number that allegedly  
8 received a text or text messages sent by Defendant RevSpring after the Settlement Class Member  
9 texted “stop” after receiving a text from Western Dental during the Settlement Class Period, and  
10 must clearly state that the Person wishes to be excluded from the Litigation and the Agreement.  
11 A request for exclusion that does not include all of this information, or that is sent to an address  
12 other than that designated in the Notice, or that is not postmarked within the time specified, shall  
13 be invalid, and the Person serving such a request shall be a member of the Settlement Class and  
14 shall be bound as a Settlement Class Member by the Court’s Orders in this Litigation and by this  
15 Agreement, if approved. The request for exclusion must be personally signed by the Settlement  
16 Class Member. So-called “mass” or “class” opt-outs shall not be allowed. Settlement Class  
17 members who timely opt-out of the Settlement will preserve their rights to individually pursue any  
18 claims they may have against Defendants, subject to any defenses that Defendants may have against  
19 those claims. Agreement at ¶ 10.4.  
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23                   Settlement Class Members shall have the right to appear and show cause, if they have any  
24 reason why the terms of this Agreement should not be given final approval, subject to each of the  
25 sub-provisions contained in section 10.2 of the Agreement. Any objection to the Settlement  
26 Agreement, including any of its terms or provisions, must be in writing, filed with the Court, with  
27 a copy served on Class Counsel, Counsel for Defendants, and the Settlement Administrator at the  
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addresses set forth in the Notice, and postmarked no later than the Opt-Out Deadline. Settlement Class Members may object either on their own or through an attorney hired at their own expense.

Any objection regarding or related to the Agreement shall contain a caption or title that identifies it as “Objection to Class Settlement in *Bulette v. Western Dental Services, Inc. and RevSpring, Inc.*, No. 3:19-cv-00612-MMC” and also shall contain the following information: (i) the objector’s name, address, and telephone number; (ii) the name, address, and telephone number of any attorney for the objector with respect to the objection; (iii) the factual basis and legal grounds for the objection, including any documents sufficient to establish the basis for his or her standing as a Settlement Class Member, including the phone number(s) at which he or she received text(s) covered by this Settlement; and (iv) identification of the case name, case number, and court for any prior class action lawsuit in which the objector and the objector’s attorney (if applicable) has objected to a proposed class action settlement. If an objecting party chooses to appear at the hearing, no later than the Opt-Out Deadline, a notice of intention to appear, either in person or through an attorney, must be filed with the Court and list the name, address, and telephone number of the person and attorney, if any, who will appear. Agreement at ¶10.2.

**f. Release of Claims**

In exchange for the Settlement consideration, Plaintiff and all Settlement Class Members, agree to the release as defined in Sections 1.1.28 and 9 of the Agreement. The Released Claims are narrowly defined to the subject matter of this action and only release the claims, liabilities, demands, causes of action, or lawsuits of the Settlement Class Members that were brought in the Litigation or that arise from text messages sent, or attempted to be sent, by or on behalf of Defendants within the four years preceding February 4, 2019.

**g. Calculation of Approved Claim Payments**

Each Settlement Class Member who timely submits a valid Claim Form by the Claims

1 Deadline shall be entitled to a single payment in an amount equivalent to his or her *pro rata* share  
2 of the Settlement Fund after any approved Fee Award, any approved Service Award, and Settlement  
3 Administration Expenses are deducted. Each Settlement Class Member shall be entitled to receive  
4 an amount equal to the Settlement Class Recovery divided by the total number of Approved Claims.  
5 Agreement at Section 4.  
6

7 **h. Distribution of Settlement Fund**

8 Within sixty (60) days after the Effective Date, or such other date as the Court may set, the  
9 Settlement Administrator shall pay from the Settlement Fund all Approved Claims by check made  
10 payable to the Settlement Class Member submitting each Approved Claim, and shall mail the  
11 checks via first-class mail.  
12

13 All payments to Settlement Class Members via check will state on the face of the check that  
14 the check will expire and become null and void unless cashed within one hundred eighty (180) days  
15 after the date of issuance. To the extent that any checks to Settlement Class Members expire and  
16 become null and void, the Settlement Administrator shall distribute the funds associated with those  
17 checks on a *pro rata* basis to Settlement Class Members who submitted an Approved Claim and  
18 who cashed their checks, if doing so is administratively and economically feasible (i.e., those  
19 Settlement Class Members would receive a second distribution of more than \$5 after costs of  
20 administration). Any remaining monies, including to the extent a second distribution is not  
21 administratively feasible, shall escheat to the applicable state. Agreement at ¶ 8.4.  
22

23 **i. Claims Process**

24 Each member of the Settlement Class who does not timely opt-out from the Settlement shall  
25 be a Settlement Class Member and entitled to make a claim. The form of the proposed Claim Form  
26 agreed upon by Class Counsel and Defendant, subject to this Court's approval and/or modification,  
27 is attached to the Settlement Agreement as Exhibit A. Only one claim per telephone number will  
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1 be validated and deemed an Approved Claim. To the extent of a deficiency in a Claim Form, the  
2 Settlement Administrator will attempt to notify the Settlement Class Member that the Claim Form  
3 was deficient. Any Settlement Class Member who submits an incomplete or inaccurate Claim Form  
4 shall be permitted to re-submit a Claim Form.

5  
6 **j. Class Counsel Fees and Expenses and Plaintiff's Service Award**

7 Defendants have agreed to pay from the Settlement Fund, reasonable attorneys' fees and costs  
8 to Class Counsel, and a Service Award to the Class Representative, in amounts approved by the  
9 Court.

10 Class Counsel, on behalf of Representative Plaintiff, shall petition the Court for a  
11 Representative Plaintiff incentive award not to exceed \$5,000. In the event the Court approves the  
12 Settlement, but declines to award a Representative Plaintiff service award in the amount requested  
13 by Class Counsel, the Settlement will nevertheless be binding on the Parties and all Settlement  
14 Class Members. Agreement at Section 5.

15  
16 Class Counsel intends to apply to the Court for attorneys' fees totaling not more than one-  
17 third of the Settlement Fund (\$3,233,333.33) and documented and reasonable expenses and costs  
18 not to exceed \$25,000.00. Class Counsel's application for fees, expenses, and costs and the request  
19 for an incentive award shall be filed no later than thirty-five (35) days prior to the Opt-Out Deadline.  
20 In the event the Court approves the Settlement, but declines to award a Fee Award in the amount  
21 requested by Class Counsel, the Settlement will nevertheless be binding on the Parties and the  
22 Settlement Class Members. Agreement at Section 6.

23  
24 The Court should consider whether to grant or deny these awards separate and apart from  
25 its consideration of the fairness and reasonableness of the Settlement.

#### 1           **IV. THE PROPOSED SETTLEMENT WARRANTS PRELIMINARY APPROVAL**

##### 2           **a. The Legal Standard for Preliminary Approval**

3           Rule 23(e) of the Federal Rules of Civil Procedure provides that before a class action may  
4 be dismissed or compromised, notice must be given in the manner directed by the court, and judicial  
5 approval must be obtained. Fed. R. Civ. P. 23(e). As a matter of public policy, courts favor  
6 settlement of class actions for their earlier resolution of complex claims and issues, which promotes  
7 the efficient use of judicial and private resources. *E.g., Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*,  
8 396 F.3d 96, 116 (2d Cir. 2005). The policy favoring settlement is especially relevant in class  
9 actions and other complex matters, where the inherent costs, delays and risks of continued litigation  
10 might otherwise overwhelm any potential benefit the class could hope to obtain. *See, e.g., id.; see*  
11 *also Newberg on Class Actions* § 11.41 (4th ed. 2002) (citing cases).

12           Approval of a class action settlement is a two-step process. The Court's first step in the  
13 process of granting preliminary approval of a settlement is to determine that the proposed  
14 settlement class is appropriate for certification. *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591,  
15 620 (1997); *Manual for Compl. Litig.*, § 21.632 (4th ed. 2004). To certify a class, the plaintiff  
16 must demonstrate that the proposed class and proposed class representative meet four  
17 requirements: (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation.  
18 Fed. R. Civ. P. 23(a)(1–4). Prior to formal class certification, a preliminary fairness  
19 determination is appropriate “[i]f the proposed settlement appears to be the product of serious,  
20 informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant  
21 preferential treatment to class representatives or segments of the class, and falls within the range  
22 of possible approval.” *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1079 (N.D. Cal.  
23 2007) (internal citation omitted). Given that the Court will have the opportunity to weigh the  
24 settlement's strengths and weaknesses with more information at the final approval hearing, the  
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1 preliminary approval hearing need not substitute for that level of review. *De Leon v. Ricoh USA,*  
2 *Inc.*, No. 18-cv-03725-JSC, 2019 U.S. Dist. LEXIS 204442, at \*27 (N.D. Cal. Nov. 25, 2019);  
3 *see also Newberg on Class Actions* § 13.13 (5th ed. 2016) (“Bearing in mind that the primary goal  
4 at the preliminary review stage is to ascertain whether notice of the proposed settlement should be  
5 sent to the class, courts sometimes define the preliminary approval standard as determining  
6 whether there is ‘probable cause’ to submit the [settlement] to class members and [to] hold a full-  
7 scale hearing as to its fairness.”). In the second step, after notice to settlement class members and  
8 time and opportunity for them to object or otherwise be heard, the court considers whether to  
9 grant final approval of the settlement as fair and reasonable under Rule 23.  
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11 The Court should take the first step in the process and grant Preliminary Approval of the  
12 Settlement. The Settlement is clearly within the range of reasonableness and satisfies all standards  
13 for Preliminary Approval.  
14

15 **b. The Settlement Satisfies the Criteria for Preliminary Approval**

16 Prior to formal class certification, a preliminary fairness determination is appropriate “[i]f  
17 the proposed settlement appears to be the product of serious, informed, non-collusive negotiations,  
18 has no obvious deficiencies, does not improperly grant preferential treatment to class  
19 representatives or segments of the class, and falls within the range of possible approval.” *In re*  
20 *Tableware Antitrust Litig.*, 484 F. Supp. 2d at 1079 (internal citation omitted); *see also Ross v. A.H.*  
21 *Robins Co.*, 700 F. Supp. 682, 683 (S.D.N.Y. 1988) (“A strong initial presumption exists in favor  
22 of a proposed settlement where the proponents establish that: (i) the settlement is not collusive but  
23 was reached after arm’s length negotiation; (ii) the proponents have counsel experienced in similar  
24 cases; (iii) there has been sufficient discovery to enable counsel to act intelligently; and (iv) the  
25 number of objectants or their relative interest is small.”).  
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Each of the relevant factors weighs heavily in favor of Preliminary Approval of this Settlement. The Settlement was the result of serious, informed, non-collusive negotiations, has no obvious deficiencies, and does not improperly grant preferential treatment to any segments of the class. Furthermore, a preliminary review of the factors related to the fairness, adequacy and reasonableness of the Settlement demonstrates that it fits well within the range of reasonableness, such that Preliminary Approval is appropriate. Kaufman Decl. ¶ 11.

Any settlement requires the parties to balance the merits of the claims and defenses asserted against the attendant risks of continued litigation and delay. Plaintiff and Class Counsel believe that the claims asserted are meritorious and that Plaintiff would prevail if this matter proceeded to trial. Defendants deny any liability and are willing to litigate vigorously. Kaufman Decl. ¶ 12. The Parties recognize and acknowledge the expense and length of continued proceedings that would be necessary to prosecute the Litigation against Defendants through trial and potentially appeals. Plaintiff's counsel also has taken into account the strength of Defendants' defenses, difficulties in proving liability, including the legal theories of vicarious liability and agency, the uncertain outcome and risk of the litigation, especially in complex actions such as this one, and the inherent delays in such litigation. Plaintiff's counsel believes that the proposed Settlement confers substantial and immediate benefits upon the Settlement Class. Based on their evaluation of all of these factors, Plaintiff and Plaintiff's counsel have determined that the Settlement is in the best interests of Plaintiff and the Settlement Class, who otherwise may have received nothing. Kaufman Decl. ¶ 9.

**i. The Settlement Agreement is the Product of Serious, Informed and Arm's Length Negotiations**

First, the proposed settlement is the product of serious, informed, non-collusive negotiations. Settlement negotiations are generally found to be non-collusive when reached with

1 the assistance of a third-party neutral, *see, e.g., Boring v. Bed Bath & Beyond of Cal. LLC*, No. 12-  
2 cv-05259-JST, 2013 U.S. Dist. LEXIS 165909, at \*21 (N.D. Cal. Nov. 21, 2013), and are found to  
3 have been informed where the parties exchanged evidence and information prior to negotiations.  
4 *See, e.g., Konstantinos Moshogiannis v. Sec. Consultants Grp., Inc.*, No. 5:10-cv-05971 EJD, 2012  
5 U.S. Dist. LEXIS 16287, at \*14 (N.D. Cal. Feb. 8, 2012) (holding that settlement was fair,  
6 reasonable, and adequate where, *inter alia*, “the parties conducted a significant amount of informal  
7 discovery...”); *Williams v. Costco Wholesale Corp.*, No. 02-cv-2003, 2010 U.S. Dist. LEXIS  
8 19674, at \*16 (S.D. Cal. Mar. 4, 2010) (“Plaintiff ha[d] sufficient information from investigation  
9 and from informal discovery to have a clear view of the strengths and weaknesses of the case and  
10 to support the settlement.”). Here, Plaintiff served and received responses to written discovery  
11 issued to both Defendants, conducted corporate representative depositions of both Defendants, and  
12 engaged in the informal exchange of information concerning the claims and Defendants’ respective  
13 defenses before finalizing the proposed Settlement. Class Counsel conducted a thorough  
14 investigation and analysis of Plaintiff’s claims and engaged in extensive formal and informal  
15 discovery with Defendants. Kaufman Decl. ¶ 4. Class Counsel’s review of that discovery and  
16 attendant issues enabled them to gain an understanding of the evidence related to central questions  
17 in the Action and prepared them for well-informed settlement negotiations. The Settlement here is  
18 the result of extensive, arm’s-length negotiations between experienced attorneys who are familiar  
19 with class action litigation and with the legal and factual issues of this Action. Kaufman Decl. ¶  
20 13. Furthermore, Class Counsel are particularly experienced in the litigation, certification, and  
21 settlement of nationwide TCPA class action cases. Kaufman Decl. ¶ 14 and Exhibit B thereto.  
22 Class Counsel zealously represented Plaintiff and the Settlement Class members’ interests  
23 throughout the litigation and continue to do so. Kaufman Decl. ¶ 15.  
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1                                    **ii. There Are No Obvious Deficiencies in the Settlement**

2            The Settlement is reasonable and fair, and there are no obvious deficiencies in the  
3 Settlement. Class Counsel are confident in the strength of Plaintiff's case, but are also pragmatic  
4 in their awareness of the various defenses available to Defendants, and the risks inherent in the  
5 pending motions, trial, and post-judgment appeal. Kaufman Decl. ¶ 6. The success of Plaintiff's  
6 claims turn on questions that would arise from the pending dispositive Motions, at class  
7 certification, summary judgment, and trial, and during an inevitable post-judgment appeal. Under  
8 the circumstances, Class Counsel appropriately determined that the Settlement outweighs the risks  
9 of continued litigation. Kaufman Decl. ¶ 6.  
10

11            Moreover, the Settlement provides an excellent result and immediate monetary relief to  
12 members of the Settlement Class and includes a comprehensive Notice Plan, as outlined above.  
13 Payments for attorneys' fees, expenses, and an incentive award for the class representative are to  
14 be paid from the Settlement Fund, but settlement is not conditioned on any such award. The  
15 Settlement includes Opt-Out and Objection provisions. Payments from the Settlement Fund that  
16 are not successfully delivered to class members will be divided among remaining class members,  
17 if administratively feasible, with no reversion of Settlement Funds to Defendants. The release of  
18 liability is also narrowly tailored to the claims presented in the action. Agreement at Section 9. The  
19 Agreement provides for a Settlement Administrator to coordinate notice to the class, any requests  
20 for exclusion, and payments to class members upon final approval. Accordingly, there are no  
21 obvious deficiencies with this settlement. *E.g. De Leon v. Ricoh USA, Inc., No. 18-cv-03725-JSC*,  
22 2019 U.S. Dist. LEXIS 204442, at \*31 (N.D. Cal. Nov. 25, 2019) (granting preliminary approval  
23 to class settlement after analyzing the general settlement provisions and finding there were no  
24 obvious deficiencies).  
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1                                    **iii. The Settlement Provides No Preferential Treatment**

2            The settlement provides no preferential treatment to any individual member of the proposed  
3 settlement class. Under the settlement, everyone in the class is treated exactly the same: each class  
4 member seeking to recover a portion of the Settlement Fund must submit the same Claim Form,  
5 and each class member submitting a Valid Claim will receive the same *pro rata* distribution from  
6 the Settlement Fund. While Plaintiff will be seeking from this Court an incentive award in  
7 recognition of the time and effort she spent acting as class representative, such awards are common  
8 and in no way preclude preliminary approval. *See, e.g., Harris v. Vector Mktg. Corp.*, No. C-08-  
9 5198 EMC, 2011 U.S. Dist. LEXIS 48878, at \*28 (N.D. Cal. Apr. 29, 2011).  
10

11                                   **iv. The Settlement Is Within the Range of Possible Approval**

12            In evaluating the range of possible approval, “courts primarily consider plaintiffs’ expected  
13 recovery balanced against the value of the settlement offer.” *Tableware*, 484 F. Supp. 2d at 1080.  
14 The monetary relief here and the fact that this litigation directly caused the Defendants to cease the  
15 violative practice places the Settlement well within the range of possible approval. Moreover,  
16 Courts have determined that settlements may be reasonable even where plaintiffs recover only part  
17 of their actual losses. Courts recognize that the “essence of settlement is compromise,” and a  
18 settlement need not represent a complete victory for the plaintiffs for it to be approved. *Isby v.*  
19 *Bayh*, 75 F.3d 1191, 1200 (7th Cir. 1996) (quoting *Armstrong v. Board of Sch. Dirs.*, 616 F.2d 305,  
20 315 (7th Cir. 1980), overruled on other grounds by *Felzen v. Andreas*, 134 F.3d 873 (7th Cir.  
21 1998)). Although the TCPA provides for statutory damages of \$500 for each violation, it is well-  
22 settled that a proposed settlement may be acceptable even though it amounts to only a small  
23 percentage of the potential recovery that might be available to the class members at trial. *See e.g.,*  
24 *National Rural Tele. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 527 (C.D. Cal. 2004) (noting that  
25 it is “well settled law that a proposed settlement may be acceptable even though it amounts to only  
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1 a fraction of the potential recovery”). “The Court’s function on this application is well known it is  
2 not to reopen and enter into negotiations with the litigants in the hope of improving the settlement  
3 to meet an objector’s particular objections; nor is the Court called upon to substitute its business  
4 judgment for that of the parties who worked out a settlement after hard, arm’s-length, good-faith  
5 bargaining. Rather, it is called upon to evaluate the probabilities of success upon a trial and to  
6 compare the benefits thereof with the terms of compromise.” *Kuck v. Berkey Photo, Inc.*, 87 F.R.D.  
7 75, 78 (S.D.N.Y. 1980).

9 Defendants will pay \$9.7 million into a non-reversionary settlement fund to resolve this  
10 matter. This amount is significant in its own right, and the amount per Class Member fits within  
11 the range of similar settlements. Here, given the anticipated Class Member participation rate, the  
12 likely per Class Member recovery is likely to be between \$100 and \$200. *See Cabiness v. Educ.*  
13 *Fin. Sols., LLC*, No. 16-CV-01109-JST, 2019 U.S. Dist. LEXIS 50817, at \*12 (N.D. Cal. Mar. 26,  
14 2019) (granting final approval where, based on class member participation, each member’s pro rata  
15 share will be \$33.36); *Estrada v. iYogi, Inc.*, No. 2:13–01989 WBS (CKD), 2015 U.S. Dist. LEXIS  
16 137299, at \*19 (E.D. Cal. Oct. 6, 2015) (granting preliminary approval to TCPA settlement where  
17 class members estimated to receive \$40); *In re Capital One TCPA Litig*, 80 F. Supp. 3d 781 (N.D.  
18 Ill. 2015) (providing for payments of \$34.60 to each claiming class member).

21 The settlement in the present case satisfies each of the four factors generally considered by  
22 courts in this district on preliminary approval, this Court should—consistent with the Ninth  
23 Circuit’s strong judicial policy favoring settlement—preliminarily approve the Settlement  
24 Agreement.

25 The \$9,700,000.00 available for the Settlement Class is more than reasonable given the  
26 complexity of the litigation, and significant risks and barriers that loomed in the absence of  
27 settlement including, but not limited to, Defendant RevSpring’s pending dispositive Motion class  
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1 certification, anticipated summary judgment and *Daubert* motions, trial as well as appellate review  
2 following a final judgment. There can be no doubt that this Settlement is a fair and reasonable  
3 recovery. Kaufman Decl. ¶ 16.

4  
5 **c. Certification of the Settlement Class is Appropriate**

6 Certification under Rule 23(a) of the Federal Rules of Civil Procedure requires that (1) the  
7 class is so numerous that joinder of all members is impracticable, (2) there are questions of law or  
8 fact common to the class, (3) the claims or defenses of the representative parties are typical of the  
9 claims or defenses of the class, and (4) the representative parties will fairly and adequately protect  
10 the interests of the class. Under Rule 23(b)(3), certification is appropriate if the questions of law or  
11 fact common to the members of the class predominate over individual issues of law or fact and if a  
12 class action is superior to other available methods for the fair and efficient adjudication of the  
13 controversy. For settlement purposes, Plaintiff and Class Counsel respectfully request that the  
14 Court certify the Settlement Class defined in Section 1 of the Agreement. “[T]he ‘settlement only’  
15 class has become a stock device in modern class action litigation.” *In re American Int’l Group, Inc.*  
16 *Securities Litig.*, 689 F.3d 229, 238 (2d Cir. 2012). “Confronted with a request for settlement-only  
17 class certification, a district court need not inquire whether the case, if tried, would present  
18 intractable management problems . . . for the proposal is that there be no trial.” *Amchem Prods.*,  
19 521 U.S. at 620.

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22 Certification of the proposed Settlement Class will allow notice of the Settlement to issue  
23 to inform Settlement Class members of the existence and terms of the Settlement, of their right to  
24 object and be heard on its fairness, of their right to opt-out, and of the date, time and place of the  
25 Final Approval Hearing. *See Manual for Compl. Litig.*, at §§ 21.632, 21.633. For the reasons set  
26 forth below, certification is appropriate under Rule 23(a) and (b)(3).  
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1 The numerosity requirement of Rule 23(a) is satisfied because the Settlement Class consists  
2 of approximately thousands of persons, and joinder of all Settlement Class members is  
3 impracticable. *See* Fed. R. Civ. P. 23(a)(1).

4 “Commonality requires the plaintiff to demonstrate that the class members ‘have suffered  
5 the same injury,’” and the plaintiff’s common contention “must be of such a nature that it is capable  
6 of classwide resolution – which means that determination of its truth or falsity will resolve an issue  
7 that is central to the validity of each one of the claims in one stroke.” *Wal-Mart Stores, Inc. v.*  
8 *Dukes*, 564 U.S. 338, 350 (2011) (citation omitted). Here, the commonality requirement is readily  
9 satisfied. There are multiple questions of law and fact – centering on Defendants’ sending text  
10 messages after class members texted “Stop” – that are common to the Settlement Class, that are  
11 alleged to have injured all Settlement Class members in the same way, and that would generate  
12 common answers.  
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15 For similar reasons, Plaintiff’s claims are reasonably coextensive with those of the absent  
16 class members, such that the Rule 23(a)(3) typicality requirement is satisfied. The typicality  
17 requirement ensures that “the interest of the named representative aligns with the interests of the  
18 class.” *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1175 (9th Cir. 2010). Typicality  
19 is present when a defendant acts uniformly toward the class members, where that uniform conduct  
20 results in injury to the class members, and where the named plaintiffs suffer a similar injury to that  
21 of the class members as a result. *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992).  
22 Plaintiff is typical of the Settlement Class members because she received an unsolicited text  
23 message from Defendants after texting “Stop” in response to receiving a text message from Western  
24 Dental, and because the Settlement Class members will all benefit from the relief provided by the  
25 Settlement.  
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1 Plaintiff and Class Counsel also satisfy the adequacy of representation requirement.  
2 Adequacy under Rule 23(a)(4) requires (1) a plaintiff's attorney to be qualified, experienced, and  
3 generally able to conduct the proposed litigation; and (2) a plaintiff to not have interests  
4 antagonistic to those of the class. *Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th  
5 Cir. 1978). Plaintiff's interests are coextensive with, not antagonistic to, the interests of the  
6 Settlement Class, because Plaintiff and the absent Settlement Class members have the same interest  
7 in the relief afforded by the Settlement, and the absent Settlement Class members have no diverging  
8 interests. Further, Plaintiff and the Settlement Class are represented by qualified and competent  
9 Class Counsel who have extensive experience and expertise prosecuting complex class actions, and  
10 TCPA class actions, in particular. Class Counsel has vigorously litigated this action and will  
11 continue to vigorously prosecute this matter through completion. Kaufman Decl. ¶ 15 and Exhibit  
12 B thereto.

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15 Rule 23(b)(3)'s predominance requirement tests "whether proposed classes are sufficiently  
16 cohesive to warrant adjudication by representation." *Torres v. Mercer Canyons, Inc.*, 835 F.3d  
17 1125, 1134 (9th Cir. 2016) (internal citation omitted). The Settlement Class readily satisfies the  
18 Rule 23(b)(3) predominance requirement because questions common to all Settlement Class  
19 members substantially outweigh any possible issues that are individual to each Settlement Class  
20 member and Defendants' records identify the list of Settlement Class members' telephone numbers.  
21 Further, resolution of thousands of claims in one action is far superior to individual lawsuits,  
22 because it promotes consistency and efficiency of adjudication. *See* Fed. R. Civ. P. 23(b)(3). For  
23 these reasons, the Court should certify the Settlement Class.  
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1                   **d. The Court Should Approve the Proposed Notice Plan**

2                   “Rule 23(e)(1)(B) requires the court to direct notice in a reasonable manner to all class  
3 members who would be bound by a proposed settlement, voluntary dismissal, or compromise  
4 regardless of whether the class was certified under Rule 23(b)(1), (b)(2), or (b)(3).” *Manual for*  
5 *Compl. Litig.*, § 21.312 (internal quotation marks omitted). The best practicable notice is that  
6 which is “reasonably calculated, under all the circumstances, to apprise interested parties of the  
7 pendency of the action and afford them an opportunity to present their objections.” *Mullane v.*  
8 *Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); *Manual for Compl. Litig.*, § 21.312.

9                   The Notice program satisfies this standard. As recited in the Settlement and above, the  
10 Notice Program will inform Settlement Class members of the substantive terms of the Settlement.  
11 It will advise Settlement Class members of their options for remaining part of the Settlement, for  
12 objecting to the Settlement, Class Counsel’s attorneys’ fee application and/or request for service  
13 award, for opting-out of the Settlement, for submitting a claim, and how to obtain additional  
14 information about the Settlement. Through the direct Mailed Notice and Settlement Website, the  
15 Notice Plan is designed to reach a high percentage of Settlement Class members and exceeds the  
16 requirements of Constitutional Due Process. Therefore, the Court should approve the Notice  
17 Program and the form and content of the Notices.

18                   **V. PROPOSED SCHEDULE OF EVENTS**

19                   In connection with Preliminary Approval of the Settlement, the Court should also set a date  
20 and time for the Final Approval Hearing. Other deadlines in the Settlement approval process,  
21 including the deadlines for requesting exclusion from the Settlement Class or objecting to the  
22 Settlement, will be determined based on the date of the Final Approval Hearing or the date on which  
23 the Preliminary Approval Order is entered.  
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Class Counsel propose the following schedule:

<u>Event</u>	<u>Date</u>
Notice Date	No more than 30 days after Preliminary Approval
Deadline for filing papers in support of Class Counsel's application for an award of attorneys' fees and expenses	No less than 35 days prior to Opt Out Deadline
Deadline for filing Motion for Final Approval	No more than 15 days prior to the Opt Out Deadline
Opt-out Deadline	45 days after the Notice Date
Responses to Objections	No more than 7 days prior to the Final Approval Hearing
Final Approval Hearing	Approximately 90 days after entry of Preliminary Approval
Claims Deadline	60 days after the Notice Date

## **VI. CONCLUSION**

Based on the foregoing, Plaintiff and Class Counsel respectfully request that the Court: (1) grant Preliminary Approval to the Settlement; (2) preliminarily approve the terms of the Settlement as within the range of fair, adequate and reasonable; (3) provisionally certify the Settlement Class pursuant to Federal Rule of Civil Procedure 23(b)(3) and (e) for settlement purposes only; (4) approve the Notice Plan and approve the form and content of the Notices of the Settlement; (5) approve the Claims process; (6) approve the procedures for members of the Settlement Class to exclude themselves from the Settlement or to object to the Settlement; (7) appoint Plaintiff as Class Representative; (8) appoint Plaintiff's counsel Avi R. Kaufman and Rachel E. Kaufman, Kaufman P.A., and Stefan Coleman, Law Offices of Stefan Coleman, P.A., as Class Counsel; and (9) schedule a Final Approval hearing, at which the Court will conduct an inquiry into the fairness of the Settlement, determine whether it was made in good faith, and determine whether to approve the Settlement and Class Counsel's application for attorneys' fees, costs, and expenses and a service award to the Class Representative. A Proposed Preliminary Approval Order is attached hereto as Exhibit 3.

1 Date: January 31, 2020

Respectfully submitted,

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17 *Counsel for Plaintiff and all others similarly situated*

18 **CERTIFICATE OF SERVICE**

19 I HEREBY CERTIFY that on January 31, 2020, I electronically filed the foregoing  
20 document with the Clerk of the Court using CM/ECF, and it is being served this day on all  
21 counsel of record via transmission of Notice of Electronic Filing generated by CM/ECF.  
22

23  
24 /s/ Rachel E. Kaufman

25 Rachel E. Kaufman